Western Publishing Co., Inc. *and* Arthur Jackson and Nathaniel Russ

Poughkeepsie Printing & Graphic Communications Union No. 448 *and* Arthur Jackson and Nathaniel Russ. Cases 3-CA-10015 and 3-CB-3707

September 17, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On October 21, 1981, Administrative Law Judge Walter H. Maloney, Jr., issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Parties filed exceptions and supporting briefs. Respondent Employer filed cross-exceptions and a supporting brief, and the Charging Parties filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings,[2] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

Respondents have a collective-bargaining agreement containing a union-security clause but no dues-checkoff provision. The contract further provides:

> Within twenty (20) days after receipt of written notice and satisfactory proof from the Union that any employee covered by this Agreement has failed to maintain membership in good standing in the Union, the Company will discontinue its employment of such employee within the bargaining unit.

The record reveals that Respondent Union was extremely lax in collecting the $15-per-month dues from its membership throughout 1979 and the early part of 1980, and that a number of employees were behind in their payments.[3] In fact, in late February 1980,[4] the International removed Respondent Union's secretary-treasurer from office and replaced him with Theodore Wallaszek, who thereafter attempted to bring employees' dues payments up to date. On or about March 1 Respondent Union, as part of its attempt to collect back dues, decided to waive the customary $5-per-month late fee on unpaid dues if members paid up by March 15. A notice to this effect was posted on the bulletin board in each chapel at the plant. Thereafter, Wallaszek made individual arrangements with certain delinquent members, several of whom agreed to make immediate partial payment with an extension of time to pay the balance.

Charging Party Jackson joined Respondent Union in early November 1979, at which time he paid his initiation fee and November dues. He thereafter made no further payments. Charging Party Russ joined in late November 1979, paying his initiation fee and December dues.

On March 17, Respondent Union sent a letter to Frank Gross, Respondent Employer's director of industrial relations, stating that four employees, including Jackson and Russ, "have not paid their required dues and assessments." The letter further stated that "[i]f dues are not paid by March 31, 1980, they will be suspended for non-payment of dues." There is no evidence that, at this point, Respondent Union had notified Jackson, Russ, or the others concerning their dues delinquencies or the fact that it was notifying Respondent Employer of the possibility of their suspension from membership.

In any event, Gross immediately sent letters to the four employees notifying them of the communication from Respondent Union and indicating that, pursuant to the contract, "you are hereby notified that non-payment of the required union dues will subject you to termination from employment with Western Publishing Company on April 7, 1980."

The testimony with respect to what was said in subsequent conversations between Jackson, Russ, and officials of Respondent Union is less than clear.

[1] We find merit in the contention by the Charging Parties and the General Counsel that the Administrative Law Judge erred in refusing to admit into evidence a copy of a decision made by an administrative law judge of the New York State Department of Labor concerning unemployment compensation claims filed by the Charging Parties. We have long held that such decisions, although not controlling as to the findings of fact or conclusions of law contained therein, have some probative value and are admissible into evidence. See, e.g., *Magic Pan, Inc.*, 242 NLRB 840 (1979); *Duquesne Electric and Manufacturing Company*, 212 NLRB 142 (1974), enfd. 518 F.2d 701 (3d Cir. 1975). *Justak Brothers and Company, Inc.*, 253 NLRB 1054 (1981), enfd. 664 F.2d 1074 (7th Cir. 1981), involved denial of a post-hearing motion to reopen the record to admit such a decision and, contrary to the Administrative Law Judge's conclusion, did not overrule *Duquesne Electric, supra*. Accordingly, we have considered this decision in reaching the conclusions contained herein.

[2] The General Counsel and the Charging Parties have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] Respondent Union had no office or telephone, and no standard practice for collecting dues. According to Charging Party Jackson's undisputed testimony, he was told by other members that they would just "catch them [union representatives] if they come by."

[4] All dates refer to 1980 unless otherwise indicated.

Jackson testified that, on or about April 1, he spoke with Wallaszek concerning his dues delinquency. According to Jackson, he told Wallaszek that he had been out sick[5] and would not have the money until payday, April 3, a Thursday. He further testified that Wallaszek agreed to wait until then. Finally, Jackson testified that Wallaszek told him he owed $45 in back dues. In contrast, Wallaszek, after initially testifying that he had no recollection of any such conversation, upon further questioning testified that he gave Jackson until April 3 to pay. However, he categorically denied ever having told Jackson the amount he owed, and insisted at the hearing that Jackson owed 4 months' dues.[6] Wallaszek further testified that he never informed Jackson of the March 31 "deadline" to make payment to avoid suspension from membership, but that "it was in my letter [to Gross]."

Russ testified that he also spoke to a union official, Chapel Chairman Ed DiBona, sometime in late March. Russ stated that he paid DiBona 1 month's dues ($15), but that he was never told the exact amount of his delinquency or that March 31 was the deadline to avoid suspension. Although the parties stipulated at the hearing that Russ paid $15 dues in late March, Wallaszek testified that he had no record of such a payment and that Russ still owed for 3 months.[7] Wallaszek further testified that he never told Russ how much he owed "but maybe one of my other officers did." Finally, he denied ever having informed Russ of the March 31 deadline.

In any event, Jackson testified that on April 3 he did not receive his paycheck until 3:30 p.m. and that, since Wallaszek by that time had left for the day, he could not pay his dues. Friday, April 4, was Good Friday and Jackson was off, as he was on Saturday and Sunday, April 5 and 6. He testified that he thought Respondent Employer's letter indicating that he was subject to discharge "on April 7" meant that he would be permitted to pay on that date. With that in mind, he reported for work at approximately 1:30 p.m., 1-1/2 hours before his shift began. He first saw Chapel Chairman Joseph Kasmir, who declined to accept payment. He then saw Wallaszek, who also refused to accept the money, telling him it was "too late."[8] Jackson then went to the personnel office, where he asked Gross to accept the money. Gross said that he could not, but suggested that Jackson talk with Wallaszek. At Jackson's request, Gross called Wallaszek to the office. Wallaszek again refused to accept the dues and Gross then talked privately with Wallaszek, telling him that if he would accept the money Respondent Employer would not discharge Jackson. Wallaszek again refused and Jackson was discharged.

Russ had left for vacation in late March and did not return until the evening of April 7. Upon receipt of a termination letter from Respondent Employer dated April 7, Russ called Gross and asked what he could do to get his job back. Gross replied, "Nothing." At no time did Russ tender his dues to Respondent Union prior to his discharge.[9]

On or about April 12, both Russ and Jackson went to a union meeting where they offered to pay their dues. Wallaszek again refused the tender. Several months later both men filed unfair labor practice charges and, after a complaint was issued, they were reinstated.

The Administrative Law Judge found that both Jackson and Russ "could obtain precise information as to the amount of their respective delinquencies and the manner of its computation by looking in their hip pockets" at their union books. He further found that there was no dispute as to how much they owed or the date by which it was due; namely, before April 7. Finally, he found that Jackson was negligent in meeting his obligation and that Russ, by leaving for vacation without paying up, demonstrated "a total indifference to his responsibilities as a union member." He concluded that, in light of their behavior "in the face of their known obligation, I see no reason here to require Respondent Union to go through the formality of restating to these individuals what they already knew." Accordingly, he dismissed the complaint. We reverse.

The Board has held that a union seeking to enforce a union-security clause against an employee has a fiduciary duty to deal fairly with that employee.[10] We have defined that duty as requiring that the union, at a minimum, must give the employee "reasonable notice of the delinquency, in-

[5] The Administrative Law Judge discredited Jackson's testimony that he had asked Wallaszek if any portion of the dues owed for the period he was out of work could be waived, and that Wallaszek said he would look into it but never got back to him.

[6] Wallaszek did not testify as to whether at that time Respondent Union was again assessing the $5 late fee. Thus, it is unclear whether, according to Respondent Union, Jackson owed $60 or more.

[7] Chapel Chairman DiBona did not testify.

[8] Respondent Union had presented a letter to Respondent Employer that morning stating that "As of this date, Nathaniel Russ and Arthur Jackson have not paid their required dues and . . . are suspended . . . ."

[9] We agree with the Administrative Law Judge's finding discrediting Russ' and Jackson's testimony that Russ had asked Jackson to pay his dues for him and the finding discrediting Jackson's testimony that on April 7 he tendered Russ' dues along with his own.

[10] *H. C. Macaulay Foundry Company*, 223 NLRB 815, 818 (1976), enfd. 553 F.2d 1198 (9th Cir. 1977); *Rocket and Guided Missile Lodge 946, International Association of Machinists and Aerospace Workers, AFL-CIO (Aerojet-General Corporation)*, 186 NLRB 651 (1970); *Conductron Corporation, a subsidiary of McDonnell Douglas Corporation*, 183 NLRB 419, 425 (1970).

cluding a statement of the precise amount and months for which dues [are] owed, as well as an explanation of the method used in computing such amount."[11] In addition, the union must specify when such payments are to be made and make it clear to the employee that discharge will result from failure to pay.[12] This fiduciary responsibility to advise an employee regarding his dues obligations requires "positive action," without regard to any concurrent obligation on the employer to provide such notice.[13]

Respondent Union herein failed to fulfill its fiduciary obligation in several respects. First, at no time did it contact the individual employees concerning their delinquencies prior to notifying Respondent Employer of their imminent suspension.[14] It was not until Jackson and Russ approached Respondent Union, after receiving the March 17 letter from Respondent Employer, that any discussion of arrearages was had with them. At that point, the deadline for avoiding suspension from membership, March 31, was near expiration for Russ and had already expired in Jackson's case.[15] The record indicates that even then, when given the opportunity to convey the required information, Respondent Union was less than precise as to the amounts owed by Jackson and by Russ, the method of computation, or the due date for payment. In this regard, as noted above, Jackson testified that he owed $45 in back dues. However, Wallaszek testified that Jackson owed 4 month's dues ($60), and no mention was made as to whether he was being assessed the $5 late fee for each month he was in arrears. In any event, Wallaszek testified that he never told Jackson the amount he owed, but that "maybe one of my *other* officers did." As to Russ, the parties stipulated at the hearing that Russ paid 1 month's dues in late March, leaving only a 2-month arrearage ($30). Yet at the hearing Wallaszek testified that he had no record of Russ' payment and that he owed for 3 months ($45) at the time of his discharge. As with Jackson, Wallaszek asserted that he did not personally tell Russ the amount he owed. Thus, not only did Respondent Union fail to inform the employees of the precise amounts of their delinquencies, but there is some question as to whether even at the time of the hearing Respondent Union itself was certain of the correct amounts of the arrearages.

With respect to the due date, there is no evidence in the record that Respondent Union ever informed the employees that they would be suspended from membership if they failed to meet their obligations by March 31, as stated in its letter to Respondent Employer. True, Jackson on April 1 told Wallaszek that he would pay his arrearage on payday, April 3, to which Wallaszek ostensibly agreed. But there is no evidence that Respondent Union informed either Jackson or Russ that March 31 was the deadline for payment. Nor did Respondent Union indicate to them that it had adopted Respondent Employer's deadline of April 7.[16]

Thus, we find that Respondent Union did not sufficiently advise Jackson and Russ of the precise amounts of their obligations, the method of computation, or the deadline for such payment. Accordingly, Respondent failed to meet its fiduciary responsibility in this regard.[17]

Our inquiry, however, does not end with this finding. The Administrative Law Judge based his dismissal of the complaint in part upon the evidence of the employees' neglect of their dues obligations. The protections enumerated above were "never intended to be so rigidly applied as to permit a recalcitrant employee to profit from his own dereliction in complying with his obligations."[18] Rather, these steps are intended to ensure

[11] *Teamsters Local Union No. 122, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (August A. Busch & Co. of Mass., Inc.)*, 203 NLRB 1041, 1042 (1973), enfd. 502 F.2d 1160 (1st Cir. 1974); see also *Food, Drug, Beverage Warehousemen and Clerical Employees, Local 595, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Certified Grocers of California, Ltd.)*, 257 NLRB 492, 494 (1981); *Chauffeurs, Salesdrivers & Helpers Union, Local 572, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Ralphs Grocery Company)*, 247 NLRB 934, 935 (1980).

[12] See, e.g., *Distillery, Rectifying, Wine and Allied Workers' International Union of America, Local Union 38, AFL-CIO (Schenley Distillers, Inc.)*, 242 NLRB 370 (1979), enfd. 642 F.2d 185 (6th Cir. 1981); *District 9, International Association of Machinists and Aerospace Workers, AFL-CIO (Marvel-Schebzer, Division of Borg-Warner Corp.)*, 237 NLRB 1278 (1978).

[13] *Jo-Jo Management Corp., d/b/a Gloria's Manor Home for Adults*, 225 NLRB 1133, 1143 (1976), enfd. 556 F.2d 558 (2d Cir. 1977).

[14] Although the Administrative Law Judge found that, on or about March 1, Respondent Union posted a notice concerning dues delinquencies, the Board has held that the posting of such a notice is by itself insufficient to show actual notice. *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, Lodge No. 732, AFL-CIO (Triple A Machine Shop, Inc., d/b/a Triple A South)*, 239 NLRB 504 (1978).

[15] The fact that Russ and Jackson may have waited 2 weeks to contact a union official concerning the letter cannot, by itself, absolve Respondent Union of its affirmative obligation to notify them of the delinquency. Neither is Respondent Employer's notice sufficient to satisfy Respondent Union's obligation. *Jo-Jo Management Corp., supra.*

[16] Moreover, Respondent Employer's notice to Jackson stated that failure to pay his dues arrearage would "subject you to termination from employment with Western Publishing Company *on April 7, 1980.*" (Emphasis supplied.) Contrary to the Administrative Law Judge's finding, in our view this language could reasonably be construed to permit payment on April 7, which Jackson attempted to do. However, in view of our other findings herein, we find it unnecessary to consider whether Respondent Union improperly refused Jackson's tender of dues on April 7.

[17] We note that, for a violation to be found, it is not necessary to show a causal connection between the failure of the Union to give sufficient notice and the employee's failure to meet his obligations. *Chauffeurs, Teamsters and Helpers Local Union 150, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Delta Lines)*, 242 NLRB 454, 455 (1979).

[18] *Produce, Refrigerated & Processed Foods & Industrial Workers Local No. 630, International Brotherhood of Teamsters, Chauffeurs, Warehouse-*

Continued

that "a reasonable employee will not fail to meet his obligation through ignorance or inadvertence, but will do so only as a matter of conscious choice."[19] Thus, when it is shown that the employee involved has "willfully and deliberately sought to evade his union-security obligations,"[20] the Board will excuse a union's failure to fully comply with the notice requirements.[21]

In the present case, however, neither the conduct of Jackson, nor even that of Russ, rises to the level of bad faith or a willful and deliberate attempt to avoid his respective dues obligations. Indeed, both employees were less than diligent in their attempts to correct their delinquencies. In this regard, Russ was especially cavalier in his attitude, leaving for vacation with the matter still unresolved. Yet, we have held that mere negligence or inattention on the part of the employee is not enough to relieve the union of its fiduciary obligation.[22] Here, both employees took the initiative to contact Respondent Union when notified by Respondent Employer of their delinquencies, and, although they may have done more to ameliorate the situation, neither Jackson's conduct, nor that of Russ, evidenced a conscious choice to avoid his obligations so as to excuse the multiple deficiencies in Respondent Union's notice procedure.[23]

We do not condone employee neglect of lawful financial obligations to a collective-bargaining representative. On the other hand, we do not consider it onerous to require that a union meet minimum notice standards in a matter of such importance to employees. Since Respondent Union fell far short of meeting the minimum notice requirements here, and absent evidence of bad faith or willful avoidance of their obligations by either Jackson or Russ, we conclude that Respondent Union, by causing the discharge of these employees, violated Section 8(b)(1)(A) and (2) of the Act.[24]

Finally, we turn to the issue of whether Respondent Employer violated Section 8(a)(3) and (1) by honoring Respondent Union's request that Russ and Jackson be discharged. The Board has held that, when placed on notice or given sufficient reason to suspect that the union may have failed to fulfill its fiduciary obligations, an employer has a duty to investigate the circumstances surrounding the request for discharge before honoring it.[25] With respect to Jackson, we find that his tender of dues to Respondent Union's secretary-treasurer on April 7, in the presence of Frank Gross, Respondent Employer's director of industrial relations, coupled with Jackson's protest that he had until the end of the day to meet his obligations, was sufficient to put Respondent Employer on notice that there was confussion at least as to the deadline for tender of the delinquent dues.[26] Under these circumstances, Respondent Employer was obligated to investigate the facts surrounding the April 7 request to terminate Jackson and, by failing to do so and instead discharging Jackson on that date, Respondent Employer violated Section 8(a)(3) and (1) of the Act.

Russ' situation, however, differs substantially from that of Jackson. There is no credible evidence that Russ at any time challenged Respondent Union's conduct or protested his discharge. Nor did he give any indication to Respondent Employer that he may have been confused as to the deadline for meeting his dues obligations. Thus, there is no evidence that Respondent Employer had any basis for believing that Respondent Union had acted unlawfully.[27] Accordingly, Respondent Employer's discharge of Russ did not violate Section 8(a)(3) and (1) of the Act.

THE REMEDY

Having found that Respondent Union has engaged in unfair labor practices in violation of Section 8(b)(1)(A) and (2) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.[28] We shall order that Respondent Union make Nathaniel Russ whole for any loss of earnings suffered by reason of the discrimination against him and, jointly and severally with Respondent Employer, make Arthur Jackson whole for any loss of earnings suffered by reason of the

men & Helpers of America (Ralph's Grocery Company), 209 NLRB 117, 124 (1974).

[19] *Valley Cabinet & Mfg., Inc.*, 253 NLRB 98, 108 (1980); see also *Teamsters Local 150, supra.*

[20] *Produce Workers Local 630, supra* at 125.

[21] See, e.g., *Big Rivers Electric Corporation*, 260 NLRB 329 (1982); *Produce Workers Local 630, supra.*

[22] See, e.g., *Valley Cabinet, supra.*

[23] Compare the cases cited in fn. 21, *supra.*

[24] In view of our finding above concerning the inadequacy of the notice to the employees, we need not consider whether, had Respondent Union sufficiently apprised Jackson and Russ of their obligations when approached by them in late March or early April, the April 7 deadline would have been a sufficient amount of time to permit the employees to meet these obligations. See, e.g., *Forsyth Hardwood Company*, 243 NLRB 1039, 1045 (1979); *Teamsters Local 122, supra.*

The General Counsel has excepted to the Administrative Law Judge's failure to address a request in his post-hearing brief to withdraw the complaint allegation that Respondent Union was motivated by "impermissible racial considerations" when it caused the discharge of Jackson and Russ. Since we agree with the Administrative Law Judge that this allegation is unsupported by the evidence, we find it unnecessary to pass on whether he erred in failing to grant the request.

[25] See, e.g. *Forsyth Hardwood Company, supra; Conductron Corporation, supra*; see also *Allied Maintenance Company*, 196 NLRB 566, 571 (1972).

[26] *Id.*

[27] See, e.g., *Valley Cabinet, supra; Interstate Bulk Carriers, Inc.*, 211 NLRB 932 (1974).

[28] Since both Russ and Jackson were reinstated to their positions by Respondent Employer sometime in November 1980, we shall not provide any reinstatement remedy herein.

discrimination against him. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Company*,[29] with interest thereon computed in the manner set forth in *Florida Steel Corporation*.[30]

Having found that Respondent Employer has engaged in an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. We shall order that Respondent Employer, jointly and severally with Respondent Union, make Arthur Jackson whole for any loss of earnings suffered by reason of the discrimination against him in the manner set forth above.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Poughkeepsie Printing & Graphic Communications Union No. 448, Poughkeepsie, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Western Publishing Co., Inc., to discharge or to otherwise discriminate against Arthur Jackson, Nathaniel Russ, or any other employee for failure to tender periodic dues without adequately advising him of his obligations.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make Nathaniel Russ whole for any loss of earnings he may have suffered as a result of the discrimination against him, with interest, in the manner set forth in the section above entitled "The Remedy."

(b) Jointly and severally with Western Publishing Co., Inc., make Arthur Jackson whole for any loss of earnings he may have suffered as a result of the discrimination against him, with interest, in the manner set forth in the section above entitled "The Remedy."

(c) Post at its business office copies of the attached notice marked "Appendix A."[31] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent Union's authorized representative, shall be posted by Respondent Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Forward a sufficient number of signed copies of the notice to the Regional Director for Region 3 for posting by Western Publishing Co., Inc., at its place of business in Poughkeepsie, New York, in places where notices to employees are customarialy posted, if Western Publishing Co., Inc., is willing to do so.

(e) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent Union has taken to comply herewith.

B. Respondent Western Publishing Co., Inc., Poughkeepsie, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in Poughkeepsie Printing & Graphic Communications Union No. 448, or in any other labor organization of its employees, by dicharging employees or otherwise discriminating against them in regard to their hire or tenure or any terms or conditions of their employment, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Jointly and severally with Poughkeepsie Printing & Graphic Communications Union No. 448, make Arthur Jackson whole for any loss of earnings he may have suffered as a result of the discrimination against him, with interest, in the manner set forth in the section above entitled "The Remedy."

[29] 90 NLRB 289 (1950).

[30] 231 NLRB 651 (1977). (see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would award interest on backpay in accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[31] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Poughkeepsie, New York, facility copies of the attached notice marked "Appendix B."[32] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent Employer's authorized representative, shall be posted by Respondent Employer immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent Employer has taken to comply herewith.

[32] See fn. 31, *supra*.

APPENDIX A

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which we were represented by counsel and at which all sides were permitted to introduce all relevant evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, in certain respects. We have been directed by the Board to post this notice and to keep the promises of this notice.

WE WILL NOT cause or attempt to cause Western Publishing Co., Inc., to discharge or to otherwise discriminate against Arthur Jackson, Nathaniel Russ, or any other employee for failure to tender periodic dues without adequately advising him of his obligations.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

WE WILL make Nathaniel Russ whole for any loss of pay he may have suffered because of the discrimination against him, with interest.

WE WILL, jointly and severally with Western Publishing Co., Inc., make Arthur Jackson whole for any loss of pay he may have suffered because of the discrimination against him, with interest.

POUGHKEEPSIE PRINTING & GRAPHIC COMMUNICATIONS UNION NO. 448

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which we were represented by counsel and at which all sides were permitted to introduce all relevant evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, in certain respects. We have been directed by the Board to post this notice and to keep the promises of this notice.

WE WILL NOT encourage membership in Poughkeepsie Printing & Graphic Communications Union No. 448, or in any other labor organization of our employees, by discharging employees or otherwise discriminating against them in regard to their hire or tenure or any terms or conditions of their employment, except to the extent that such rights may be affected by an agreement requiring memberhip in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights.

WE WILL, jointly and severally with Poughkeepsie Printing & Graphic Communications Union No. 448, make Arthur Jackson whole for any loss of earnings he may have suffered as a result of the discrimination against him, with interest.

WESTERN PUBLISHING CO., INC.

DECISION

STATEMENT OF THE CASE

FINDINGS OF FACT

WALTER H. MALONEY, JR., Administrative Law Judge: This case came on for hearing before me in Poughkeepsie, New York, upon a consolidated unfair labor practice complaint,[1] issued by the Regional Director for Region 3 of the Board which alleges that Respondent Poughkeepsie Printing & Graphic Communications Union No. 448 (herein called the Union or Local 448) caused Respondent Western Publishing Company, Inc. (herein called the Company),[2] to discharge Arthur Jackson and Nathaniel Russ, two members whose dues payments were delinquent, and that the Company, in fact, discharged Jackson and Russ in such a manner as to encourage unlawfully their membership in the Respondent Union. An amendment to the consolidated complaint alleges that the Union was guilty of racial discrimination when it sought the discharge of Jackson and Russ for nonpayment of dues. However, no such charge was leveled against Respondent Company for effectuating the discharges. Each Respondent asserts that Jackson and Russ were properly discharged for nonpayment of dues but they devote most of their respective efforts in attempting to place the exclusive responsibility for the discharges upon the other Respondent. The Union contends that it never asked the Company to discharge the two employees. The Company contends that the Union did make such a request and that it had no reason to go behind the request to inquire into any procedural or other irregularities which may have attended the Union's request. Upon these contentions, the issues herein were joined.

I. THE UNFAIR LABOR PRACTICES ALLEGED

For a number of years, Respondent Company has operated a large printing plant in Poughkeepsie, New York. In the operation of this plant, it maintains collective-bargaining relationships with five different unions, one of which is a respondent in this case. Respondent Union represents about 50 pressmen and helpers who work on three shifts. A collective-bargaining agreement between the two Respondents was concluded on November 7, 1977, and extended through September 29, 1980. It was in full force and effect during the period in which the events in this case transpired.[3]

Charging Party Arthur Jackson started to work for the Company on December 4, 1978, in another bargaining unit. At that time he was represented by Graphic Arts Local 13-B. On June 4, 1979, he transferred to the pressroom and became a member of the Local 448 bargaining unit. Charging Party Nathaniel Russ has worked for the Company for about 6 years. For most of that time he worked in the bindery. In March 1979, he transferred to the pressroom.

The collective-bargaining agreement between both respondents has a conventional union-security clause which requires all persons who are members as of the effective date of the agreement to remain members and requires new employees to become union members on or after the 30th day following the commencement of employment. The contract also provides:

> Within twenty (20) days after receipt of written notice and satisfactory proof from the Union that any employee covered by this Agreement has failed to maintain membership in good standing in the Union, the Company will discontinue its employment of such employee within the bargaining unit.

The contract covering the pressroom does not contain a dues-checkoff provision, although such provisions are found in other agreements to which the Company is a party.

Throughout 1979 and the first part of 1980, Respondent Union was negligent in collecting dues from its membership. Dues are $15 per month, payable in advance on the first day of each month, and a portion of the money collected is remitted by Local 448 to its International as a *per capita tax*. Local 448's former secretary-treasurer, Thomas Raimondi, did a haphazard job of collecting dues and remitting the *per capita* tax. In fact, Raimondi was remiss even in collecting his own dues. Late in February 1980, the International stepped in, removed Raimondi from office, and appointed Wallaszek, a long-time union member and former officer, to replace Raimondi. From this point forward, Respondent Union made a diligent effort to collect back dues, including those owed by Russ and Jackson.

Some 4 months after becoming a member of the bargaining unit, Jackson was initiated into the Union. On November 3, 1979, he paid an initiation fee of $56.95, 1 month's dues for November amounting to $15, and was given a union book in which these payments were recorded. They are the only payments recorded in Jackson's book.[4] On November 30, 1979, some 8 months

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[1] The principal docket entries in this consolidated case are as follows: Charge in Case 3-CA-10015, filed by Arthur Jackson and Nathaniel Russ against Respondent Company on September 23, 1980; charge in Case 3-CB-3707 filed against Respondent Union on September 23, 1980; consolidated complaint issued by Regional Director for Region 3 on October 22, 1980; answer filed by Respondent Company on October 30, 1980; answer filed by Respondent Union on November 12, 1980; amendment to complaint issued on July 14, 1980; hearing held in Poughkeepsie, New York, on July 29, 1981; briefs filed with me on or before September 14, 1981.

[2] Respondents then admit, and I find, that Western Publishing Company, Inc., is a Wisconsin corporation which maintains a place of business in Poughkeepsie, New York, where it is engaged in the printing of books, magazines, and similar matters. In the course and conduct of its business, it annually ships from its Poughkeepsie, New York, plant directly to points and places outside the State of New York goods and merchandise valued in excess of $50,000. Accordingly, Respondent Company is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] A resolution of this sharply contested case has been made measurably more difficult by the fact that the three principal witnesses to the events in controversy — Jackson, Russ, and Secretary-Treasurer Theodore J. Wallaszek—were all thorough unreliable witnesses. I am reluctant to premise findings upon the testimony of any of these witnesses, unless the testimony was corroborated or related to an uncontested point.

[4] The book provides a space for the entry of payment of each month's dues as well as other fees and assessments. The practice of the Union is to take the book along with the dues from the member upon payment,

Continued

after entering the bargaining unit, Russ was initiated into the Union. He paid an initiation fee of $61.39 and dues for December in the amount of $15. As discussed later, Russ claims to have paid Edward DiBonna, the Union's recording secretary and second-shift chapel chairman, 1 month's dues sometime late in March. However, the Union's records, as reflected by a document introduced by the General Counsel, do not indicate any such payment and Wallaszek testified that he never received such a payment. Russ claims he surrendered his union book to DiBonna when making the payment and the book was never returned.[5]

On February 25, 1980, as part of the Union's crackdown on delinquent members, Wallaszek sent Frank Gross, the Company's director of industrial relations, a letter notifying Gross that employees McKinnies and Gallagher had not paid their initiation fees. Gross sent McKinnies and Gallagher a letter saying that if they did not pay their fees before March 17 they would be subject to termination. Later, Wallszek notified Gross that Gallagher had not paid but McKinnies had, so Gross sent Gallagher a letter of discharge, stating as the reason the latter's failure to pay his union initiation fee.

On or about March 1, union officers decided to offer an inducement to delinquent members to pay up by waiving the $5-per-month late charge on unpaid dues if those dues were paid by March 15. A notice to this effect was posted, along with the monthly meeting notice, on the bulletin board in each chapel at the plant. Wallaszek made individual arrangments with certain delinquent members, who requested them to pay portions of their back dues immediately, giving them extentions to pay the balance. On March 17, Wallaszek sent Gross a letter notifying him that four employees—Jackson, Russ, Gary Roe, and Thermond Owens—had not paid required dues and assessments. The letter to Gross also stated that, if their dues were not paid by March 31, the individuals in question would be suspended for nonpayment.

Gross immediately dispatched letters to each of the named individuals. The letters, all dated March 17, stated:[6]

> Western Publishing Company, Inc., was informed on March 17, 1980, by the Poughkeepsie Printing and Graphic Communications Union No. 448 that you have not paid the union dues that are required to remain a member of the Union.
>
> Pursuant to Article 5 (Union shop) of the present labor contract between Western Publishing Company and the P. P. & G. C. U., No 448, you are hereby notified that non-payment of the required union dues will subject you to termination from employment with Western Publishing Company on April 7, 1980.
>
> If you have any questions in regard to this matter, please contact your union representative or my office.

On March 25, Wallaszek notified Gross that Owens and Roe had paid their dues so no further action was taken against them.

Russ claims that late in March, he paid 1 month's dues to DiBonna. When asked why he did not pay DiBonna the entire amount of $45 which was then due, he said that he was unable to do so because there had been illness in his family and he was the sole breadwinner. Shortly thereafter, Russ and his family left Poughkeepsie for a 10-day vacation trip to Florida.

Jackson testified that on March 31 or April 1 he found Wallaszek at the plant and had a discussion with him about paying back dues.[7] According to Jackson, the conversation took place in Wallaszek's department at the plant. Wallaszek has only a vague recollection of this encounter. They both agreed that Jackson would have until Thursday, April 3, to pay his back dues, which they agreed were $45. On April 3, Jackson did not pay the agreed upon amount. He had no money with which to pay his dues when he arrived at work. He received his paycheck about 3:30 p.m., but did not cash it until later on in the evening. The rest of the plant worked on Friday, April 4, which was Good Friday, but the pressroom did not operate and Jackson did not work. The plant was closed on Saturday and Sunday.

On Monday morning, April 7, at the beginning of the first shift, Wallaszek presented Gross with a letter respecting Russ and Jackson which read:

> As of this date, Nathaniel Russ and Arthur Jackson have not paid their required dues and assessments to this Local. They, therefore, are suspended for nonpayment of dues.

On that afternoon, Jackson arrived for work about an hour and a half before the beginning of his shift. Russ was still on vacation and did not return to Poughkeepsie until late Monday evening.[8] In going through the plant, Jackson saw Chapel Chairman Joseph Kasmir and offered to pay his dues to Kasmir. Kasmir declined to accept them. Jackson also saw his supervisor, Joseph Martell, and Martell suggested that he go to the personnel office. On his way to the personnel office, he saw Wallaszek and offered to pay his dues to Wallaszek. Wallaszek refused to accept the money, telling Jackson that it was too late. When Jackson arrived at the personnel

make the appropriate entry in the book, and then return the book to the member together with a receipt. The member then retains the book in his possession until making his next payment.

[5] Months later, after Russ was reinstated, he received a second book.

[6] There is no dispute that Russ and Jackson received the letter sent to them by Gross.

[7] Russ never personally tendered to the Union all of the dues which were owed by him. He testified that, en route to Florida, he suddenly remembered that he owed union dues and, upon his arrival at his mother's house, phoned Jackson and asked Jackson to pay the balance of his dues for him. Jackson reportedly agreed. Jackson says that he got such a phone call from Russ but places it on Sunday, April 6, the day before the threatened termination date in Gross' letter. At this time, Russ was either en route back to New York or making immediate preparations for this trip. I discredit both stories.

[8] At that time, Wallaszek was working the first shift and was employed from 7 a.m. until 3 p.m. Jackson was working the second shift from 3 until 11 p.m. Accordingly, in order to find Wallaszek on the job, Jackson had to come to the plant premises shortly before the beginning of his shift.

office, he saw Gross and told Gross that Wallaszek had refused to accept his dues. He asked Gross to accept the dues payment. Gross said that he was aware of the fact that Jackson owed dues to the Union but refused to accept the money. Gross also told Jackson that if Wallaszek refused to accept his money, then Jackson was fired. He suggested that Jackson speak with a union official.

At Jackson's request, Gross summoned Wallaszek to the personnel office. Gross told Wallaszek in Jackson's presence that Jackson had offered the dues to him and that he had refused to accept the money. Wallaszek refused again to accept Jackson's money. Following this exchange, Gross had a private conversation with Wallaszek and informed the latter that if he would accept the money the Company would not discharge Jackson. Wallaszek again refused. I credit Gross' testimony, which is similar to Wallaszek's, that at no time during this episode did Jackson tender any money on behalf of Russ.

On the afternoon of April 7, Gross sent a certified letter to Russ which read:

> Due to your failure to render the union dues as per Article 5 of the current Collective Bargaining Agreement, your employment with Western Publishing Company has been terminated effective April 7, 1980. We have enclosed a copy of your Separation Notice.

On April 9, the Company wrote a similar letter to Jackson, informing him that he was discharged for his failure to pay union dues and enclosing his final paycheck and vacation check.

Upon receipt of the termination letter, Russ called Gross and asked what he could do to get his job back. Gross said, "Nothing." On or about April 12, Russ and Jackson went to a union meeting which took place at the VFW Hall. Russ and Jackson offered to pay their dues but Wallaszek again refused to accept them. Several months later, both men filed the unfair labor practice charges in the instant case. After the consolidated complaint was issued, they were both restored to duty.

In April 1980, Wallaszek notified the Company that union members Scott Quinlan and Raimondi, the former secretary-treasurer, were delinquent in their dues. Gross sent Quinlan and Raimondi standard letters notifying them that unless they paid their dues before a stated date they would be discharged pursuant to the provisions of the collective-bargaining agreement. Quinlan and Raimondi paid up within the grace period allowed so no further action was taken against them.

II. ANALYSIS AND CONCLUSIONS

There is no question that, under the statute and the applicable collective-bargaining agreement covering the pressman's bargaining unit, the Union was entitled to request the Company to discharge delinquent members and the Company was entitled to do so. There is also no question that both Russ and Jackson were seriously delinquent in the payment of their monthly dues. One of the major contentions of the General Counsel and the Charging Parties is that both Respondents violated the Act when Russ and Jackson were fired because the Union failed to observe certain procedural requirements surrounding the discharge of delinquent union members which the Board first established in *Teamsters Local Union No. 122 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (August A. Busch & Co.) of Mass., Inc.*, 203 NLRB 1041 (1973). According to *Busch* rules, whenever a union seeks the discharge of a delinquent member for non-payment of dues it must first inform the member that he is delinquent, that he can be discharged for nonpayment of dues, that he owes a stated amount which has been computed in a manner explicated in the notice, and that the member be given an indeterminate grace period in which to pay up. Failing such notice, a union violates Section 8(b)(1)(A) and (2) when it requests the discharge of a member, even if the member is delinquent and the union is otherwise entitled to exercise the sanction authorized by Congress in the proviso to Section 8(a)(3) of the Act. An employer who culpably discharges an employee to whom such notification has not been given violates Section 8(a)(1) and (3) of the Act. In a later enlargement of this doctrine, the Board has held that it is no defense to ignore a union when its erring member has already acquired information concerning his delinquency through other sources. The union must affirmatively provide him with information or lose the protection of the proviso to Section 8(a)(3). *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, Lodge No. 732, AFL-CIO (Triple A Machine Shop, Inc., d/b/a Triple A South)*, 239 NLRB 504 (1978).

In the instant case, Russ and Jackson both knew they would be fired if they failed to pay their union dues before April because the Company notified them of this fact in its warning letters of March 17. Both failed to pay their back dues before April 7. The period of time allowed by the warning notice was a grace period which the Company was contractually allowed to grant. However, it was not legally or contractually required to give Russ and Jackson so much leeway in meeting their obligations.[9]

[9] The General Counsel and the Charging Party contend that Russ and Jackson could properly have paid their dues on Monday, April 7, and thereby avoid discharge under the terms of the Company's notice, because the General Construction Law of the State of New York provides that where an obligation falls due on Sunday, the obligor has until the following Monday to meet the obligation. This is not entirely correct. Sec. 20 of the General Construction Law provides:

> A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made. If such period is a period of two days, Saturday, Sunday or a public holiday must be excluded from the reckoning if it is an interverning day between the day from which the reckoning is made and the last day of of the period.

Section 25 states:

> Where a contract by its terms authorized or requires the payment of money or the performance of a condition within or before or after a period of time computed from a certain day, and such period of time ends on a Saturday, Sunday, or a public holiday, unless the contract expressly or impliedly indicates a different intent, such payment may be made a condition performed on the next succeeding business day
> . . . .

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Russ and Jackson both carried union books in which the amount of their monthly payments were recorded, by month, and in which blanks appeared for the months for which they had not paid dues. They could obtain precise information as to the amount of their respective delinquencies and the manner of its computation by looking in their hip pockets. According to their testimony, there was no dispute in late March and early April as to how much they owed. Russ claims to have paid 1 month's dues before leaving for Florida and Jackson claims that he had made an agreement with Wallaszek to pay a stated sum on April 3.

While the Board has severely circumscribed a union's power to compel discharge of deliquent members, it has never held that inability to pay dues and initiation fees excuses payment. Such a holding would be tantamount to repealing the proviso to Section 8(a)(3). When Russ decided that he would rather use the money available to him to finance a trip to Florida instead of meeting a long overdue obligation to his collective-bargaining agent, he was simply demonstrating a total indifference to his responsibilities as a union member. Jackson promised Wallaszek to pay up on April 3 and did not do so. Thus, he was accorded a grace period from the Union and then abused the indulgence he had received.[10] In so doing, he merely underscored the neglect he had already demonstrated by allowing his dues to fall so far in arrears.

On several occasions the Board has excused the failure of a union to give formal notification or render particularized bills to delinquent members where those members showed bad faith or a disposition to avoid their financial obligations. *Great Lakes District, Seafarers' International Union of North America, AFL-CIO (Tomlinson's Fleet Corporation)*, 149 NLRB 1114 (1964); *Produce, Refrigerated & Processed Foods & Industrial Workers Local No. 630, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Ralph's Grocery Company)*, 209 NLRB 117 (1974); *John J. Roche & Co., Inc.*, 231 NLRB 1082 (1977), affd. *sub nom. Henry Larkin* v. *N.L.R.B.*, 596 F.2d. 240 (7th Cir. 1979). In light of the behavior of Russ and Jackson in this case and in the face of their known obligations, I see no reason here to require the Respondent Union to go through the formality of restating to these individuals what they already knew.

The General Counsel and the Charging Parties also argue that Jackson's unsuccessful efforts to pay his dues to Wallaszek and others on April 7 are sufficient to transform his discharge (and that of Russ) into a violation of the Act, even if these discharges might not be a violation under some other legal theory. The sequence of events which occurred on April 7 was that Wallaszek told Gross in writing early in the morning that Russ and Jackson had not paid their dues and had been suspended from membership.[11] Gross testified that he intended to discharge these individuals but became busy during the day and had not gotten around to writing discharge letters when, in the middle of the afternoon, Jackson came in, complained that Wallaszek would not accept his money, and asked Gross to do so. What followed was an additional tender of Jackson's dues to Wallaszek in Gross' presence and a continued refusal on the part of Wallaszek to accept them. As found above, no tender was made by or on behalf of Russ. A few days later, following the receipt of the discharge letters, Russ and Jackson went to the union meeting and tried unsuccessfully to pay their back dues on this occasion.

The tender by Jackson on April 7 was untimely and was made at a point in time which followed the request by the Union to the Company to effectuate his discharge and the discharge of Russ. I take it still to be the law that a tender of dues, made prior to discharge but following a union's request to discharge for nonpayment of dues, does not render a discharge unlawful. *General Motors Corporation, Packard Electric Division*, 134 NLRB 1107 (1961).[12] The reason for such a rule was explained very painstakingly by the Second Circuit in *The International Association of Machinists, AFL-CIO, and Lodge 1021, International Association of Machinists, AFL-CIO*

Even if otherwise applicable, this statute would not serve to authorize the payments of dues by Jackson and Russ on Monday, April 7. The letters they received from Gross were clear and unambiguous in their terms and require no interpretation or extrinsic aids to construction. The letters stated that "you are hereby notified that nonpayment of the required union dues will subject you to termination from employment from Western Publishing Company on April 7, 1980." The letters did not specify payment of dues within a period of time to be measured from a certain day. They required payment before a stated day. The fact that the day immediately preceding the stated day was a Sunday is immaterial. The notice was specific in its terms that an employee risked separation on April 7, a Monday, if he did not meet his union obligations before the date. Accordingly, Wallaszek was entitled to demand the discharges of Russ and Jackson on the morning of April 7 if he was entitled to demand it at all.

[10] Jackson's complaint about the unavailability of union officials to whom he might make payment is particularly unpersuasive and unappealing and is, in my judgment, further evidence of his delinquent attitude. Wallaszek worked the first shift. He could and did take dues at the plant from anyone who approached him on that shift. Jackson, a second-shift employee, knew where to find Wallaszek when he wanted to find him and located Wallaszek at the plant on Monday, March 31, and Monday, April 7, when he was interested in seeing him. Jackson could not find him on Thursday, April 3, when he did not have the available funds with which to pay his debt. Indeed, if the two men had collided in the hallway at the change of shift on April 3, Jackson would not have paid Wallaszek because he did not have the funds available at that moment. Other employees pay dues to the chapel chairman on their shift, mail their dues to Wallaszek's home (his address is in the phone book and would be available from the Company's personnel office), or otherwise see to it that their dues get paid. There comes a point in time when the debtor must seek out the creditor and this Jackson failed to do until the 11th hour. As discussed above, what he regarded as the 11th turned out to be the 13th hour.

[11] It is frivolous for the Union to contend that this letter did not constitute a request that the Company discharge the two individuals named therein. The letter contains the same language used by the Union in notifying the Company of the refusal of other employees to pay dues within the 20-day grace period normally allowed by the Company. In other cases, this type of letter triggered the discharge of delinquent members. Moreover, the letter could have no other purpose than to serve as a request to discharge Russ and Jackson since the Company had no interest in whether these employees were in good standing with the Union, except insofar as that information might bear upon its right to discharge them and the plainly expressed intention to do so found in its March 17 warning letters.

[12] On this point the Board, in *General Motors, supra*, reversed an earlier holding in *Aluminum Workers International Union, Local No. 35, AFL (The Metal Ware Corporation)*, 112 NLRB 619 (1955), to the effect that such a tender was still a valid tender. In *Aluminum Workers*, the Board reversed an earlier holding in *Chisolm-Ryder Company, Inc.*, 94 NLRB 508 (1951), which had announced a rule consonant with the one revived in the *General Motors* case.

[*New Britain Machine Company*] v. *N.L.R.B.*, 247 F.2d. 414, 420 (1957), as follows:

> If labor organizations are to be allowed effective enforcement of union security provisions, they must be free to invoke the sanction of loss of employment against those union members who are delinquent in tendering their periodic dues. This sanction might become meaningless if an employee could avoid its impact by an eleventh hour tender of back dues just prior to actual discharge. Moreover, an employer might effectively frustrate the expeditious collection of dues by warning recalcitrant employees to tender their dues when the union finally pressed its request for discharge by resorting to the N.L.R.B., arbitration, or, as here, by threat of strike. It seems clear to us that Congress did not intend that the efficacy of valid union security provisions should depend solely on the employer's willingness to act promptly upon a request for an employee's discharge when the validity of that request is not in issue. Rather, we believe that the employee who is delinquent in paying his union dues is a "free rider," whose discharge can be compelled by the union under an applicable union security provision, even though that employee belatedly tenders his back dues in full before actual discharge.

According to *General Motors, supra*, when a union declines a tender of dues between the time of its demand for discharge and the actual effectuation of the discharge, the Board must then look to the Union's real motive in persisting in its demand to have the delinquent member removed from the employer's payroll. I conclude in this case that the Union's real motive was the same as its asserted motive, namely, to obtain the money needed to maintain its operations and to pay the periodic *per capita* tax it must render to its International and to spare itself the tedious excuses and endless collection problems that follow from the presence of inveterate free riders on its rolls. Accordingly, the allegation of violation of Sections 8(a)(1) and (3) and 8(b)(1)(A) and (2) contained in the original consolidated complaint should be dismissed.

The General Counsel and the Charging Parties make one more contention. They argue that the Union, in seeking the discharges of Russ and Jackson, was guilty of racial discrimination, although they level no such charge against the Company whom the General Counsel believes to be in *pari delicto* with the Union in bringing about the discharges. The General Counsel admits that there is no case law to support the contention that racial discrimination in this context also constitutes an unfair labor practice. Whatever this allegation lacks in precedent or equity between the parties is a mild short coming in light of the evidence adduced to support the contention. The evidence shows that, once the International removed the former secretary-treasurer and appointed Wallaszek to replace him, Respondent Union embarked upon a program to collect back dues from everyone who owed back dues. It sought the discharge of both black and white employees who owed dues and who had not paid up within prescribed or agreed-upon periods of time. It relented and withdrew its requests for the discharge of both black and white employees when and if they paid up. Respondent Union's neligence in pursuing this sanction extended even to its former secretary-treasurer, whose discharge it sought until he completed the financial obligations he failed to fulfill when he was in office. The Board had held that the failure of a union to request the discharge of all delinquent members does not prevent it from requesting the discharge of some delinquent members, *North American Refractories Company*, 100 NLRB 1151,[13] although such does not appear to be the case herein. Its efforts in this case do not show leniency toward some and diligence toward others but an even-handed effort to collect back dues from whoever owed them. Accordingly, the allegation in the amended complaint that Respondent Union violated Section 8(b)(1)(A) and (2) should be dismissed.[14]

Upon the foregoing findings of fact and upon the entire record herein considered as a whole, I make the following:

CONCLUSIONS OF LAW

1. Respondent Western Publishing Company, Inc., is an employer engaged in commerce and in operations af-

[13] Former Board Chairman Farmer stated as follows in another case:

> The Board has held, with court approval, that, in effect, all that may be required of an employee is the payment of dues. An employee who pays dues or tenders his dues is not vulnerable to discharge at the request of the union. Conversely, it is self-evident that an employee who deliberately fails to pay or tender his dues, when there is in effect a lawful union-security provision in the contract covering the terms and conditions of his employment, makes himself vulnerable to discharge.
>
> This is true, in my opinion, regardless of the fact that there may be other delinquent employees who discharge is not requested by the union. Any other result would lead to the harsh and restrictive principle that a union must seek the discharge of all employees who are delinquent in their dues, that a union cannot be lenient to some without losing its legal right to secure the discharge of other delinquents. The proviso to Section 8(a)(3) scarcely operates so as to *require* the discharge of all dues delinquents. It is permissive, not mandatory, and it is at the option of the union, at a time when the union chooses to exercise its right, and for whatever reasons impel the union to do so, that the union may seek the discharge of a particular "free rider." *Special Machine and Engineering Company*, 109 NLRB 838, 844 (1954).

[14] The General Counsel urges that I reverse a ruling, made at the hearing, in which I excluded from evidence a decision in an unemployment compensation case involving Western Publishing, Russ, and Jackson, which was issued on August 20, 1980, by James T. O'Donnell of the Administrative Law Judge section of the New York State Department of Labor. In its recent decision in *Justak Brothers and Company, Inc.*, 253 NLRB 1054 (1981), the Board rejected the introduction of a copy of an unemployment compensation case decision involving the discriminatee in that case because the Board held that it was rendered under a statute with different definitions, policies, and purposes than those found in the National Labor Relations Board Act, because the unfair labor practice at issue in the Board case was not considered by the State Unemployment Compensation Commission, and because a decision by the Board and its administrative law judges must be based on an independent consideration and evaluations of the evidence introduced in the Board proceeding. In coming to this conclusion, the Board necessarily reversed an earlier holding to the contrary which is found in *Duquesne Electric and Manufacturing Company*, 212 NLRB 142 (1974). I am governed by the Board's latest holding on this point announced in *Justak*. Accordingly, I adhere to my earlier ruling which excludes from evidence herein the decision of a state administrative law judge in the unemployment compensation case involving Russ and Jackson.

fecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Poughkeepsie Printing & Graphic Communications Union No. 448 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Western Publishing Company, Inc., did not violate Section 8(a)(1) and (3), as alleged in the consolidated complaint herein.

4. Respondent Poughkeepsie Printing & Graphic Comminications Union No. 488 did not violate Section 8(b)(1)(A) and (2) of the Act, as alleged in the consolidated complaint and in the amended complaint herein.

[Recommended Order for dismissal omitted from publication.]